UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, **STATE OF CALIFORNIA,** **COMMONWEALTH OF KENTUCKY,** **STATE OF MICHIGAN,** **STATE OF NORTH CAROLINA,** **STATE OF OHIO,** **COMMONWEALTH OF PENNSYLVANIA,** **and** **STATE OF TEXAS,** *Plaintiffs*, v. **REPUBLIC SERVICES, INC., and** **ALLIED WASTE INDUSTRIES, INC.,** *Defendants*.	**CASE NO.: 1:2008CV02076** **JUDGE: Hon. Richard W. Roberts** **DECK TYPE: Antitrust** **DATE STAMP: July 16, 2009**

PLAINTIFFS' MOTION AND MEMORANDUM
FOR ENTRY OF FINAL JUDGMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), plaintiffs, United States of America ("United States"), the State of California, the Commonwealth of Kentucky, the State of Michigan, the State of North Carolina, the State of Ohio, the Commonwealth of Pennsylvania, and the State of Texas (the "States"), move for entry of the proposed Final Judgment filed in this civil antitrust proceeding. The Final Judgment may be entered at this time without further hearing if the Court determines that entry is in the public interest. The Competitive Impact Statement ("CIS"), filed in this matter on December 3, 2008, explains why entry of the proposed Final Judgment would be in the public interest. The United States is filing simultaneously with this Motion and Memorandum a Certificate of Compliance setting forth the steps taken by the parties to comply with all

applicable provisions of the APPA, 15 U.S.C. § 16(b)–(h), and certifying that the statutory waiting period has expired.

I. Background

A. Pre-Complaint Investigation

On June 23, 2008, Republic and Allied entered into an agreement for Republic to acquire Allied in a stock transaction. After Republic and Allied announced their plans to merge, the United States conducted an extensive investigation into the competitive effects of the proposed transaction. As part of this investigation, the United States obtained documents and information from the merging parties and conducted more than 600 interviews with customers, competitors, and other individuals with knowledge of the industry. The investigative staff carefully analyzed the information provided and thoroughly considered all of the issues presented. The United States considered the potential competitive effects of the transaction on small container commercial waste collection and municipal solid waste ("MSW") disposal services in a number of geographic areas, obtaining information about these services and these areas from market participants. The United States concluded that the combination of Republic and Allied likely would lessen competition in small container commercial waste collection service or MSW disposal service in 15 separate geographic markets.

Small container commercial waste collection service is the collection of MSW from commercial businesses such as office and apartment buildings and retail establishments (*e.g.*, stores and restaurants) for shipment to, and disposal at, an approved disposal facility. Because of the type and volume of waste generated by commercial accounts and the frequency of service required, haulers organize commercial accounts into routes, and generally use specialized

equipment to store, collect, and transport MSW from these accounts to approved MSW disposal sites. This equipment (*e.g.*, one- to ten-cubic-yard containers for MSW storage and front-end load vehicles commonly used for collection and transportation of MSW) is uniquely well suited for providing small container commercial waste collection service. Providers of other types of waste collection services (*e.g.*, residential, hazardous waste, and roll-off services) are not good substitutes for small container commercial waste collection firms. In these types of waste collection efforts, firms use different waste storage equipment (*e.g.*, garbage cans or semi-stationary roll-off containers) and different vehicles (*e.g.*, rear-load, side-load, or roll-off trucks), which, for a variety of reasons, cannot be conveniently or efficiently used to store, collect, or transport MSW generated by commercial accounts and, hence, rarely are used on small container commercial waste collection routes. In the event of a small but significant increase in price for small container commercial waste collection services, customers would not switch to any other alternative.

A number of federal, state, and local safety, environmental, zoning, and permit laws and regulations dictate critical aspects of storage, handling, transportation, processing and disposal of MSW. In order to be disposed of lawfully, MSW must be disposed in a landfill or incinerator permitted to accept MSW. Anyone who attempts to dispose of MSW in an unlawful manner risks severe civil and criminal penalties. In some areas, landfills are scarce because of significant population density and the limited availability of suitable land. Accordingly, most MSW generated in these areas is burned in an incinerator or taken to transfer stations where it is compacted and transported on tractor trailer trucks to a more distant permanent MSW disposal site. A transfer station is an intermediate disposal site for processing and temporary storage of

MSW before final disposal at more distant landfills or incinerators for final disposal.

Because of the strict laws and regulations that govern MSW disposal, there are no good substitutes for MSW disposal in landfills or incinerators, or at transfer stations located near the source of the waste. Firms that compete in MSW disposal services profitably can increase their charges to haulers of MSW without losing significant sales to any other firms. MSW disposal services generally occur in localized markets. Because of transportation costs and travel time to more distant MSW disposal facilities, a substantial percentage of the MSW generated in an area is disposed of at nearby landfills or transfer stations. In the event that all owners of local disposal facilities imposed a small but significant increase in the price of disposal of MSW, haulers of MSW generated in that area could not profitably turn to more distant disposal sites.

After investigation, the United States and the States concluded that the proposed transaction would lessen competition in the provision of non-franchised small container commercial waste collection or MSW disposal services in 15 areas: Los Angeles, California; San Francisco, California; Denver, Colorado; Atlanta, Georgia; northwestern Indiana; Lexington, Kentucky; Flint, Michigan; Cape Girardeau, Missouri; Charlotte, North Carolina; Cleveland, Ohio; Philadelphia, Pennsylvania; Greenville-Spartanburg, South Carolina; Fort Worth, Texas; Houston, Texas; and Lubbock, Texas. In each of these areas, Republic and Allied are two of only a few significant firms providing small container commercial waste collection or MSW disposal services.

As more fully explained in the Complaint and the CIS, this loss of competition would result in consumers paying higher prices and receiving fewer services for the collection and disposal of MSW. As alleged in the Complaint, the proposed acquisition of Allied voting

securities by Republic would remove a significant competitor in small container commercial waste collection and MSW disposal services in already highly concentrated and difficult-to-enter markets. In each of these markets, the resulting substantial increase in concentration, loss of competition, and absence of any reasonable prospect of significant new entry or expansion by market incumbents likely would result in higher prices for collection of small container commercial waste collection or MSW disposal services.

B. The Proposed Final Judgment

On December 3, 2008, the United States and the States filed the Complaint in this matter, alleging that defendant Republic's acquisition of defendant Allied, if permitted to proceed, would combine two of only a few significant providers of small container commercial waste collection service or MSW disposal service in several markets in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Accordingly, the Complaint sought to prevent the anticompetitive effects of the acquisition by requesting, among other things: (1) a judgment that the acquisition, if consummated, would violate Section 7 of the Clayton Act, and (2) relief to enjoin the parties from consummating the merger.

At the same time, the United States filed a proposed Final Judgment, which is designed to eliminate the anticompetitive effects of the acquisition, a CIS, and a Hold Separate Stipulation and Order ("Hold Separate Order") signed by the United States, the States, and the defendants consenting to the entry of the proposed Final Judgment after compliance with the requirements of the APPA.[1]

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[1] Pursuant to this Court's Order of April 2, 2009, the United States, the States, and the defendants filed their Joint Status Report on May 4, 2009, identifying the steps taken since this Court's December 4, 2008 entry of the Hold Separate Order.

The proposed Final Judgment is designed to preserve competition in each of the 15 affected geographic markets. It requires Republic and Allied to divest a total of 87 commercial waste hauling routes, nine landfills, and 10 transfer stations, together with ancillary assets and, in three cases, access to landfill disposal capacity. The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in small container commercial waste collection and MSW disposal services in each of these areas. The divestiture of these assets to an independent, economically viable competitor will ensure that users of these services in each market will continue to receive the benefits of competition that otherwise would be lost.

II. Compliance with the APPA

The APPA requires a sixty-day period for the submission of public comments on the proposed Final Judgment. 15 U.S.C. § 16(b). In compliance with the APPA, the United States filed a CIS on December 3, 2008. The United States published the proposed Final Judgment and the CIS in the *Federal Register* on December 16, 2008, and in *The Washington Post* during the period December 31, 2008 to January 6, 2009. During the comment period, which expired on March 9, 2009, the United States received five comments; the Response to the comments was filed with the Court on May 14, 2009 and published in the *Federal Register* on June 16, 2009. As recited in the Certificate of Compliance, all the requirements of the APPA now have been satisfied. It is therefore appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the Final Judgment.

III. Standard of Judicial Review

Before entering the proposed Final Judgment, the Court is to determine whether the

Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute, as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act).[2]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what

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[2] The 2004 amendments substituted "shall" for "may" in directing a court to consider relevant factors and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004) *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

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[3] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459-60. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[4]

The United States alleged in its Complaint that the acquisition of Allied by Republic would substantially lessen competition for small container commercial waste collection and MSW disposal services in several markets in the United States. The remedy set forth in the proposed Final Judgment resolves the competitive effects of concern by requiring the divestiture of either Republic's or Allied's small container commercial waste collection and/or MSW

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[4] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

disposal assets in each of the affected areas. Accordingly, the proposed Final Judgment is within the range of settlements consistent with the public interest. *See* CIS and Response to Public Comments.

IV. Conclusion

For the reasons set forth in this Motion and Memorandum, CIS, and the Response to Public Comments, the Court should find that the proposed Final Judgment is in the public interest and should enter the proposed Final Judgment without further hearings.

The United States respectfully requests that the proposed Final Judgment be entered as soon as possible.

Dated: July 16, 2009

Respectfully submitted,

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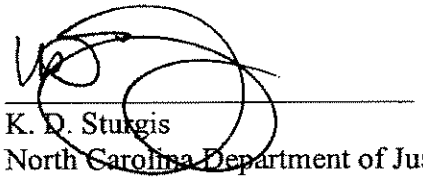

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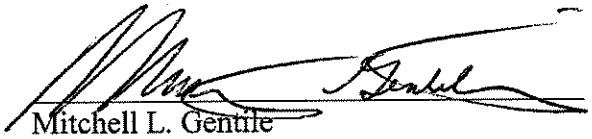

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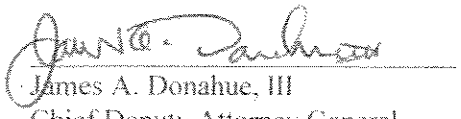

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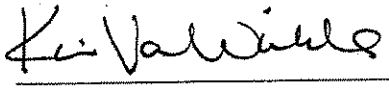

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CERTIFICATE OF SERVICE

I, Stephen A. Harris, hereby certify that on July 16, 2009, I caused a copy of the foregoing Motion and Memorandum for Entry of Final Judgment to be served upon defendants Republic Services, Inc. and Allied Waste Industries, Inc. by mailing the document electronically to the duly authorized legal representatives as follows:

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